No. 6456.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
TSUGIO MIYAZONO,
On Habeas Corpus.

BRIEF OF APPELLANT, TSUGIO MIYAZONO.

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STATEMENT OF CASE.

This is an appeal from an order discharging a writ of habeas corpus and remanding Tsugio Miyazono to the custody of the United States Immigration Service. [Transcript of Record, p. 12.]

The original records of the Department of Labor have been filed with the clerk of this court, pursuant to order of the District Court. [Transcript of Record, p. 20.]

Throughout this brief said records and files will be referred to as "Immigration File." Printed Transcript of Proceedings in the District Court will be referred to as "Transcript of Record."

Tsugio Miyazono, a minor of the age of fourteen (14) arrived at the Port of San Pedro, California, on the 23rd day of June, 1930, from Japan, accompanied by his father, Shichitaro Miyazono, and an older brother, Hideo Miyazono, of the age of sixteen (16) and applied for admission as a United States citizen. The father was admitted the day of his arrival on presentation of his re-entry permit showing him to be a returning resident alien. The older brother, Hideo Miyazono, was admitted on July 16, 1930, as a native-born citizen of the United States, and Tsugio Miyazono was denied admission on the ground (a) that he was born in Japan, (b) that he is an immigrant alien not in possession of an unexpired immigration visa as required by the Immigration Act of May 26, 1924; and (c) that he is an alien of a race ineligible to citizenship and not exempted by paragraph (c) of section 13 of the Act of 1924, from the operation of said Act. (Immigration File.)

Tsugio Miyazono appealed to the Secretary of Labor at Washington, D. C. and on the 4th day of August, 1930, the excluding decision of the Board of Special Inquiry at San Pedro, was affirmed. (Immigration File-Decision of Board of Review.)

On the 13th day of August, 1930, upon petition of Tetsushi Chiota, next of friend of Tsugio Miyazono, a writ of habeas corpus issued out of the District Court of the United States in and for the Southern District of California, Central Division, and applicant was released thereon upon posting $500 bail. [Transcript of Record, p. 3.]

Appellant relies upon one specification of error as follows:

Specification No. 1. The court erred in holding and deciding that Tsugio Miyazono was not entitled to enter the United States as the son of a resident alien. This is Assignments of Error Nos. First, Second, Third, Fourth, Fifth, Sixth and Seventh. [Transcript of Record, p. 15.]

ARGUMENT.

Appellant contends that there was an arbitrary conduct imported to the hearing on the part of the Board of Special Inquiry to such extent that the entire proceedings were prejudicial to the applicant in that the hearing was conducted solely upon the right of applicant to enter the United States as a citizen and at no time was the applicant informed of his rights nor questioned as to his status in respect to his right to apply for entry into this country as the son of a resident alien. (Immigration File Transcript of Proceedings before Board of Special Inquiry, June 26, 1930.)

The issues under which applicant's rights to admission were determined were whether he was born in the United States or in Japan and this was more clearly conveyed to the Board through the prejudicial remarks of the chairman of the Board of Special Inquiry at the time the case was opened. (Foot of page 1, Immigration File Proceedings of Board of Special Inquiry.) The applicant was not given an opportunity to be heard on the question of his status as son of a resident alien and in this respect it is not a fair hearing in which the Inspector

or the Board of Special Inquiry chooses or controls the witnesses or prevents witnesses the accused desires from appearing or testifying. Applicant was not given an opportunity to explain his testimony wherein he stated it was his belief that he was born in the United States.

Unfortunately, through inadvertence, the word citizen was employed instead of the word resident in petitioner's opening brief in the court below, and this error we feel was recognized and understood by the court in view of the argument presented and the correct testimony as recorded before the Board of Special Inquiry and petitioner's closing brief.

It is of course conceded and obviously the record clearly shows that the applicant applied for admission as a citizen, while on the other hand, all the testimony of the witnesses on behalf of the applicant was clearly to establish that he was in fact born in Japan and did not claim the right to enter this country as a citizen, yet was allowed to proceed fully on the theory that the hearing was conducted solely for the purpose of determining his status as a citizen and not that as a resident alien.

It is respectfully submitted that the record in the present case does not show that a hearing instituting a fair investigation was conducted; or that the authority of the immigration officers was exercised firmly and consistently with the fundamental principles of Justice embraced in due process of law.

At the examination before the Board of Special Inquiry at San Pedro, June 26, 1930, the father, Shichitaro Miyazono, testified in part as follows (Immigration File, p. 3):

> "Q. When you returned to the United States in May, 1916, what did you do with Tsugio? A. Tsugio was born in Japan, but my wife went back when she was pregnant so I thought it best to get

birth certificate and register his birth here. I left Tsugio in Japan.

Q. You had also the child's birth recorded in Japan, did you not? A. Yes.

Q. Then when you returned to the United States you recorded his birth also? A. Yes.

Q. Where did you represent Tsugio as having been born, to the Japanese Association? A. I told them he was born in Japan."

Same witness further testified (Immigration File, p. 4):

"Q. You talked this matter over with Mr. Takao at the time you wanted Tsugio's birth recorded? A. Yes, I told Mr. Takao that I had a child born in Japan and asked him if it was alright for me to record his birth in the United States. He advised me that he thought it was alright, so I asked him to do so."

And further the witness testified (Immigration File, foot of page 4):

"Q. Do you claim United States citizenship for your young boy, Tsugio Miyazono? A. I could not tell you whether he is a United States citizen or a Japanese citizen.

Q. Did you consult with anybody in regard to that? A. No.

Q. You know that a Japanese can not come here unless he has certain papers? A. No, I don't.

Q. You intend to represent to this office or the immigration officials on the ship that Tsugio was actually born here in the United States, were you not? A. No, I had no such intention but I had this birth certificate so I thought the boys could come back to the United States."

The Applicant Was Not Required to Have a Visa.

An unexpired immigration visa was not required of the alien for the reason that it was not required of his parent and therefore applicant was in the same status as one born subsequent to the issuance of the immigration visa to accompanying parent.

It must be borne in mind that the father, Shichitaro Miyazono was first admitted to this country in the year nineteen hundred and never relinquished his domicile, and with the exception of about four (4) return visits to Japan, he has continuously resided in the United States, and at no time was he required to present a visa and at the time of his return to this country, June 26, 1930, he was admitted upon his re-entry permit.

The mother, Haru Miyazono, was admitted to permanent residence in the United States, November, 1912, and never relinquished her domicile here.

The Immigration Act of May 26, 1924, at section 13a of said Act is as follows:

> "No immigrant shall be admitted in the United States unless he (1) has an unexpired immigration visa, *or born subsequent to the issuance of the immigration visa of the accompanying parent,* (2) is of the nationality specified in the visa in the immigration visa. (Italics ours.)
>
> (b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily, may be admitted to the United States without being required to obtain an immigration visa."

At no time has the father's right to admission under his re-entry permit been questioned and nowhere in the record of the Immigration File is it shown that his status as a returning resident alien was disputed. (Immigration File.)

The question of whether or not the father, Shichitaro Miyazono, had or had not been admitted to the United States as a merchant was not presented at the hearing before the Board of Special Inquiry, and in this respect, we respectfully submit that the father was admitted to this country in the year nineteen hundred at a time when it was not required that Japanese be formally classified as merchants. Appellant urges that no greater showing be required of Japanese than of Chinese and under the Chinese exclusion law, Chinese need only establish their engagement as merchant in this country for one year, and it might well be said that if a similar showing was required of the alien, Tsugio Miyazono, as to his father's status, he could have established such fact if given an opportunity to do so.

The father, Shichitaro Miyazono's status as a lawfully domiciled alien resident has never been questioned.

Our search of cases applicable to the status of wives and minor children of Chinese merchants have shown us that the query in such cases was whether or not the father was a *bona fide* merchant and had a legal entry of some kind into the United States.

U. S. vs. Gue Lim, 176 U. S. 459, 44 L. Ed. 544;

Cheung Sum Lee v. Nagle, 268 U. S. 336, 69 L. Ed. 985;

In re Chung Toy Ho and Wong Choy Sin, 42 Fed. 398;

In re Ting Yeong, 9 Sawy. 620, 19 Fed. 184;

U. S. v. Gue Lim (D. C. Wash), 83 Fed. 136.

However, this feature as to the status of the applicant, Tsugio Miyazono, was not gone into by the Board of Special Inquiry at San Pedro, and we vigorously contend that by reason thereof and by reason of our contentions hereinbefore set forth, that there was an abuse of discretion, and respectfully cite the court the case of:

U. S. ex rel. Berman v. Curran, 13 Fed. Rep. (2d) 96,

wherein the court held:

> "The exclusion of the petitioners on the ground that they were, in the words of the statute 'children under 16 years of age, unaccompanied by or not coming to one or both of their parents.' In section 3 of the Act of 1917, was, in view of their full qualification for admission under Rule 6, promulgated by the Department of Labor to enforce the cited section of immigration law, an abuse of discretion because of a failure to exercise discretion, and, therefore, unlawful."

and further the court held in the above case that:

> "For these several reasons we find that the record of proceedings before the immigration officers does not show such a regular procedure in accordance with the requirements of the law as to justify their action in refusing the petitioner's admission to the United States."

We respectfully call the Honorable Court's attention to the case of:

Ex parte Fong Yim, 134 Fed. 938,

where the court said at page 941:

> "It is claimed that these children, having never before entered this country, stand on the same footing as ordinary Chinese persons who have acquired a right to domicile; but the answer is that their adopted father has such right, and that their right to enter is incident to his right to enter. The question is perhaps not so much concerning their right to enter as it is concerning his right to have them enter. Of course, whether adopted children have the same rights as natural children, is a different question, but, assuming that they have, the fact that they have never been in this country does not put them, in my opinion, in the same position as an ordinary Chinese alien who has never been in this country, and who has no relations with anyone in it."

In the case of

U. S. v. Gue Lim, 176 U. S. at p. 468,

the court said:

> "In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes they come in by reason of their relationship to the father, and whether they ac-

company or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate."

Where an alien is deprived of his liberty, or is about to be deported, by means of the abuse of discretion, or the arbitrary action, of an immigration inspector, or other executive officer, or without a full and fair hearing on the charge against him, the power is conferred and the duty, imposed upon the courts of the United States to issue writ of habeas corpus and relieve him.

Whitfield v. Hanges, 222 Fed. 745.

An alien should be given opportunity appropriate to the case to be heard upon the question involving his right to be and to remain in the United States.

Japanese Immigrant Case, 189 U. S. 86.

Conclusion.

Appellant, Tsugio Miyazono, does not contend that he is a citizen of the United States and the Immigration File affirmatively shows that Shichitaro Miyazono, the father of Tsugio Miyazono, is a resident alien and has been such for over a period of thirty years, that he has never relinquished his United States domicile and was admitted to this country in the year nineteen hundred, and with the exception of several visits to Japan, he has continuously resided here and has never had his right as an alien resident questioned.

Tsugio Miyazono's mother, Haru Miyazono, was admitted to permanent residence in the United States in November, 1912, and departed from the United States on November 18, 1915, and at the time of her departure, the child, Tsugio Miyazono, had already been conceived, and the records of the Immigration File disclose that she departed from this country merely for a temporary visit to Japan and was there taken sick and while in Japan, the son, Tsugio, was born on April 3, 1916.

Although the child was left in Japan, the mother returned to this country and her right to re-enter was not questioned.

We contend that Tsugio Miyazono was not given a fair hearing consistent with the fundamental conception and principles of due process of law and we respectfully urge that the hearing before the Board of Special Inquiry and the subsequent decision on the appeal to the Department of Labor, were unfair and arbitrary and that therefore the writ of habeas corpus should be sustained and the applicant, Tsugio Miyazono, be entitled to enter the United States as the son of a resident alien, duly domiciled and entitled to remain in this country and for the reasons hereinbefore set out, the judgment of the lower court should be reversed and Tsugio Miyazono be discharged from custody.

Respectfully submitted,

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Attorney for Appellant.